

ESTTA Tracking number: **ESTTA205885**

Filing date: **04/18/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177234
Party	Plaintiff Cardinal Health 303, Inc.
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Submission	Motion to Strike
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Date	04/18/2008
Attachments	Cardinal Health - Alaris Group - Motion to Strike Oslick Declaration -oii_DOC.pdf (7 pages)(28848 bytes)

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|------------------------------|---|------------------------------|
| 1. CARDINAL HEALTH 303, INC. | : | |
| Opposer | : | |
| v. | : | Opposition No.: 91-177,234 |
| THE ALARIS GROUP, INC. | : | |
| Applicant | : | |
| | : | |
| 2. CARDINAL HEALTH 303, INC. | : | |
| Opposer | : | |
| v. | : | Opposition No.: 91-177,365 |
| THE ALARIS GROUP, INC. | : | |
| Applicant | : | |
| | : | |
| 3. CARDINAL HEALTH 303, INC. | : | |
| Opposer | : | |
| v. | : | Opposition No.: 91-177,366 |
| THE ALARIS GROUP, INC. | : | |
| Applicant | : | |
| | : | |
| 4. CARDINAL HEALTH 303, INC. | : | |
| Opposer | : | |
| v. | : | Opposition No.: 91-177,367 |
| THE ALARIS GROUP, INC. | : | |
| Applicant | : | |
| | : | |
| 5. CARDINAL HEALTH 303, INC. | : | |
| Petitioner | : | |
| v. | : | Cancellation No.: 92-048,172 |
| THE ALARIS GROUP, INC. | : | |
| Registrant. | : | |

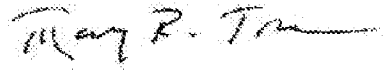
**CARDINAL HEALTH 303, INC.’S MOTION TO STRIKE PORTIONS OF THE
ALARIS GROUP, INC.’S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Pursuant to TBMP 505.01, TBMP 528.05(b), Cardinal Health 303, Inc. moves to strike the Declaration of Scott M. Oslick, attached as Exhibit B to Alaris Group, Inc.’s Reply Brief, as well as portions of this Reply Brief that rely upon Exhibit B, on the basis that Mr. Oslick’s

Declaration does not state facts that would be admissible into evidence and/or does not show affirmatively that Mr. Oslick would be competent to testify to the matters stated therein.

Dated: April 18, 2008

Respectfully submitted,

By: 

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**CARDINAL HEALTH 303, INC.’S MOTION TO STRIKE PORTIONS OF THE
ALARIS GROUP, INC.’S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

In its Reply Brief, Alaris Group, Inc. (Alaris Group) seeks to hold out its own attorney, Mr. Scott M. Oslick, as an expert of trademark law in order to lend false creditability to its own conclusory arguments regarding the similarity between Alaris Group’s products and services and those of Cardinal Health 303 (Cardinal). This self-serving declaration fails to meet the standards of TBMP 528.05(b) for evidence that may be considered by Affidavit or Declaration in a Motion for Summary Judgment and therefore should be stricken from the record pursuant to TBMP 505.01.

There are three requirements set out in TBMP 528.05(b) and Mr. Oslick’s declaration fails two of them. First, it fails to set forth facts that would be admissible into evidence and instead substitutes Mr. Oslick’s unsupported conclusions, without analysis, of several legal issues in this case, including the ultimate legal question of whether there is a likelihood of confusion between the marks of the two parties.

Second, the declaration fails to show why Mr. Oslick would be competent to testify as to the matters stated in the declaration. Neither Mr. Oslick’s current employment as a lawyer with the firm representing Alaris Group nor his prior employment as a trademark examiner establish any special level of expertise beyond that of the other lawyers involved in this case or the Board itself.

1. Mr. Oslick’s Declaration Does Not Set Forth Facts That Would Be Admissible Into Evidence

Mr. Oslick declares that he has reviewed “all of the documents submitted to date” by Cardinal. [Oslick Decl. ¶ 3]. Without specifically discussing any of these documents, Oslick

proceeds to pronounce them insufficient to “show use of the ALARIS mark for every good and/or service listed in Registration No. 2,279,724.” [Oslick Decl. ¶ 4]. Mr. Oslick further concludes, again without any analysis, that the documents fail to show Cardinal’s “use of the ALARIS mark is in any way related to The Alaris Group’s claimed goods/services.” [Oslick Decl. ¶5]. Finally, Mr. Oslick concludes, again without elaborating upon the basis for his conclusion, that the documents produced by Cardinal “show very narrow use of its claimed ALARIS mark.” [Oslick Decl. ¶6]. Notably, Mr. Oslick attaches not a single produced document to his declaration and provides no explanation as to why any particular document or the collection of documents as a whole is insufficient.

Even if Mr. Oslick were a proper expert and had tendered a properly supported expert opinion on the various conclusions he states in his declaration, these conclusions are obviously not binding upon the Board and may be properly disregarded. The Board and its predecessor have long held that the opinions of witnesses will not be substituted for the ultimate decision to be reached by the court. *See, e.g., Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1731 (T.T.A.B. 1999)(refusing to consider expert opinions regarding the application of the legal standards in the case); *American Home Products Corp. v. USV Pharmaceutical Corp.*, 190 U.S.P.Q. 357, 359 (T.T.A.B. 1976)(“This testimony, however, is self-serving in character...it is settled that the expressions of opinion by witnesses, including persons considered to be experts in a particular field, as to whether or not the marks mentioned in any given proceeding are or are not so related as to cause a likelihood of confusion in trade is not binding upon either the Board or the courts.”); *The Quaker Oats Co. v. St. Joe Processing Co., Inc.*, 43 C.C.P.A. 892, 894–95, 232 F.2d 653, 655 (CCPA 1956)(“if such testimony were adopted without consideration of other

aspects of the case, the effect would be to substitute the opinions of witness for the ultimate decision to be reached by the court and would therefore be improper.”).

2. Mr. Oslick’s Declaration Does not Show Affirmatively That He Would Be Competent to Testify to the Matters Stated Therein

Mr. Oslick’s declaration provides no indication whatsoever that he has any special knowledge or expertise that would make him competent to testify as to the broad and unsupported conclusions provided in his declaration. Mr. Oslick’s declaration does not provide, for example, that he has any prior experience or expertise in the medical field in which the parties both sell their goods and services. Thus, the declaration does not affirmatively demonstrate that he is competent to testify with regard to his conclusions on the uses of the parties’ marks on various goods and services, including the sufficiency and similarity of these uses.

Moreover, Mr. Oslick’s current employment as an attorney with the firm that represents Alaris Group, and his former employment as a trademark examiner, also fails to affirmatively demonstrate that he is competent to testify with regard to his broad conclusions of his declaration. Trademark examiners and attorneys are not *per se* experts on any subject and Mr. Oslick’s declaration does not establish any special expertise in trademark law not already present on the Board itself.


Therefore, the Oslick declaration is incapable of assisting the Board in the determination of the pending Motion for Summary Judgment. It is nothing more than an obvious attempt to manufacture “evidence” in order to rehash legal arguments by other means. Under these conditions, it is appropriate for the Board to grant Cardinal’s motion under TBMP § 506.01 to

strike this clearly insufficient declaration along with the text in Alaris Group's Reply Brief that relies upon it.¹

Dated: April 18, 2008

Respectfully submitted,

By:



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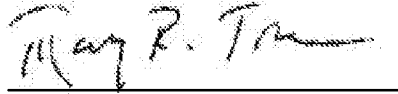
Attorneys for Opposer
Cardinal Health 303, Inc.

¹ Alaris Group Reply Bf. at Pg. 3-4 (paragraph beginning at the bottom of page three and continuing to page four).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following attorney of record for Applicant by electronic and First Class Mail, this 18th day of April 2008:

Kristine Boylan
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A handwritten signature in dark ink, appearing to read "Mary R. True", is written over a horizontal line.

Mary R. True